

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

JOE SHOCKLEY AND THE
VERMONT STATE COLLEGES
FACULTY FEDERATION

DOCKET NO. 81-82

MEMORANDUM AND ORDER
ON FEDERATION'S MOTION
TO RETRACT AND RECONSIDER

Majority Opinion

On May 27, 1982, the Vermont Labor Relations Board issued its decision in the above-entitled matter. 5 VLRB 192 (1982). On June 7, 1982, the Vermont State Colleges Faculty Federation ("Federation") filed a Motion to Retract and Reconsider. We treat this Motion as one to amend the judgment of the Board under VRCP 52(b), and find it is timely filed. The Vermont State Colleges ("Colleges") filed an Answer to the Federation's Motion on June 14, 1982.

The Federation's Motion is based on four grounds. Each will be discussed in turn.

The first contention of the Federation is the Board erred in denying its request to amend its original petition filed with the Board by erroneously assuming the Federation was seeking to allege discrimination based on age. On Page 202 of the Opinion, the Board stated:

The Federation seeks to amend its petition to allege Grievant was discriminated against based on sex, age or handicap. In both the Step I and Step II grievances filed, Grievant claimed one member of the Department was given a warning to get student evaluations up or face nonreappointment later, while he was terminated. Grievant charged reappointing that person discriminated against him because he was not given the chance to improve, and the discrimination was unlawful because it was based on age, sex or handicap. However, in the petition filed with the Board, Grievant did not allege he was discriminated against on the basis of age, sex or handicap, and did not reference the anti-discrimination provision of the Agreement.

The Federation contends this paragraph is an erroneous statement of its amendment, that what it alleged was discriminatory application of a rule, the rule being the Colleges' reappointment criteria on teaching effectiveness. The Federation states it wished to compare Grievant and Cathy DeLeo in order to determine whether Dean Graby fairly applied the reappointment criteria to Grievant.

At the hearing, the Federation sought to amend its petition to allege both discriminatory application of a rule or regulation and discrimination based on age, sex or handicap. Still, we are inclined to our view that this issue was not properly raised in the pleadings. As we note in Finding of Fact #37, the petition filed with the Board did not allege discriminatory application of a rule or regulation or discrimination because of age, sex or handicap. This is in violation of Section 23.3 of the Board's Rules of Practice which provides the notice of grievance shall contain a concise statement of the nature of the grievance and specific references to the pertinent sections of the collective bargaining agreement. The Colleges, thus, were not on timely notice discrimination was an issue and we consider the issue untimely raised.

Moreover, even if we allowed the Federation to amend its petition and the facts established the Dean discriminatorily applied the reappointment criteria to Grievant, that would not indicate the decision not to reappoint him was discriminatory. The parties have bargained for the President to make final decisions, not the Dean, Hackel, Esiason, et al., ___ Vt. ___ (December 1, 1981), and here, President Murphy conducted a review of Grievant independent of the Dean's review. (See Finding #21). We conclude that even if the merits of this issue were reached, the outcome would be the same.

The Federation's second objection to the Board's Opinion is based on the following paragraph on Page 210:

There is no evidence to show on a faculty-wide basis what the standard is for teaching excellence. A review of student evaluations may indicate students rate a teacher above average, but the President may consider such a rating as the norm, and teachers would have to do significantly better to meet the criteria. "Above average" must be in relation to something, and we think the President's role requires a mind which assesses performance within the academic community. Moreover, we cannot tell on this record whether 17 percent negative comments are below average or above.

The Federation argues this interprets "average" in comparison to other teachers, which was inconsistent with the Board's ruling at the hearing precluding the Federation from introducing evidence on the results of Cathy DeLeo's student evaluations.

This paragraph of the Opinion must be viewed in the context of the entire Opinion. We did not mean to imply an analysis and comparison of Grievant's student evaluations to those of other faculty members would be required or even permitted. Rather, in rejecting the Federation's challenge of the rationality of the President's judgment by a statistical analysis of Grievant's student evaluations as an invalid tool, we intended to point out the extreme difficulty in determining exactly what "above average" means. That is a judgment we assumed President Murphy had special expertise to make, and concluded the parties bargained that, in the final analysis, this was a presidential function if rationally based. See In re Hackel, Esiason, et al., ___ Vt. ___ (December 1, 1981).

Moreover, the Federation's argument places undue significance on the importance of student evaluations in non-reappointment cases. Since our original Opinion, we have the Vermont Supreme Court decision In re

Esther Swett, ___ Vt. ___ (1982), to aid us in further deliberations here. In Swett, the Court says, and we obviously agree, the Agreement [Article XXXIII(1) here] requires "only that teacher evaluations are used to 'aid' in the reappointment decision. It does not require that the decision be based in whole or in part on the evaluations". Therefore, even if Grievant demonstrated his student evaluations were clearly "above average", which we doubt, this still would not compel his reappointment.

The third ground of the Federation's Motion is the Board's Opinion dealt only with student evaluations and ignored the evaluations of Grievant by his peers. We note that peer evaluations, like evaluations by students, are only an "aid" in the reappointment decision. In any event, Finding #28 of our original decision indicates President Murphy reviewed the "entire contents of Grievant's personnel file". Included in the file were peer evaluations. If necessary to explain our Opinion, we conclude she considered the peer evaluations along with all other material in Grievant's personnel file, but determined Grievant's teaching effectiveness did not warrant reappointment. For reasons given in our earlier Opinion, we believe the President's decision should stand.

The Federation's final contention is that while the Board found President Murphy's testimony on her review of Grievant's evaluations contradictory, it drew no conclusion from this fact. As fact-finders, the majority believes President Murphy read all the appropriate evaluations in Grievant's personnel file at the time of her review. Thus, we conclude the President's review met contractual standards.

In its memorandum, the Federation argues this decision as it stands effectively eliminates the need for collective bargaining and is devastating to the Federation; that the President will be able to determine the meaning of teaching effectiveness at will, on a case-by-case basis, without any constraints. We do not agree with the Federation since the President's decision must be rationally based; but if the Federation is correct, we believe the fault lies in the negotiated contract, not in our interpretation of it. The Supreme Court has pointed out that it is our function to interpret the provisions of a disputed contract, not remake it or ignore it, In re Grievance of the Vermont State Employees' Association on behalf of certain "Phase Down" Employees, 139 Vt. 63 (1980), and not to read terms into a contract unless they arise by necessary implication. In re Adele Stacy, 138 Vt. 68 (1980). Further, 3 VSA §1002(d) states "The board shall not modify, add to, or detract from a collective bargaining agreement". In this decision, we have interpreted the terms of the contract, and to decide what the Federation asks would be to remake the negotiated contract.

Accordingly, nothing raised by the Federation in its Motion to Retract and Reconsider persuades us to change any part of our original decision.

ORDER

Now, therefore, based on the foregoing reasons it is hereby ORDERED:

The Federation's Motion to Retract and Reconsider the Findings of Fact, Opinion and Order issued May 27, 1982, in Grievance of Joe Shockley and the Vermont State Colleges Faculty Federation is DENIED.

Dated this 15th day of July, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney
Kimberly B. Cheney, Chairman

James S. Gilson
James S. Gilson

Dissenting Opinion

I concur with the Majority's denial of the Federation's request to amend its petition filed with the Board. However, for the reasons stated in my original Dissenting Opinion, the Federation's Motion to Retract and Reconsider should have been granted.

William G. Kemsley, Sr.
William G. Kemsley, Sr.

*Appeals to
Sup. Ct.
Appeal dismissed pursuant
to stip filed 3/31/83*